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87-236

NO._____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GORDON MCLEAN CAMPBELL, PETITIONER

V.

THE BOEING COMPANY, RESPONDENT

ON PETITION FOR CERTIORARI TO THE

WASHINGTON STATE COURT OF APPEALS

DIVISION I

PETITION FOR WRIT OF CERTIORARI

Gordon McLean Campbell

Petitioner

1631 Belmont Avenue

#208

Seattle, WA 98122

QUESTIONS PRESENTED FOR REVIEW

A. Whether, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), construing 49, Appendix U. S. C. #1506, the savings clause of the federal aviation program, the trial court had jurisdiction over the subject matter of a complaint seeking an injunction and alleging that, in order to avoid the hazard of falling planes in Seattle where plaintiff lives, defendant should be required to notify the crews of planes to be sold by defendant which fly over Seattle of a new explanation for the movement of the air according to which the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will. (The new explanation presents the possibility that the air could, by intelligent, controlled, voluntary movements, shift

the path of a plane or even force it down to earth.)

B. Whether, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, the doctrine of primary jurisdiction was applicable where, on a motion to dismiss, the allegations of the complaint were undenied and a suit for injunction within the conventional competence of the courts was involved and the only question presented regarding the new explanation for the movement of the air was whether the crews should be instructed about said explanation.

C. Whether, under the holding of Nader v. Allegheny Airlines, Inc., the doctrine of primary jurisdiction was applicable where there is no statute or regulation about the new explanation for the movement of the air.

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OPINIONS BELOW

No opinions of the courts below were reported.

JURISDICTION

The ruling of the commissioner of the court of appeals of the state of Washington division one sought to be reviewed was dated and entered on March 4, 1987.

The order of the court of appeals of the state of Washington division one denying motion to modify commissioner's ruling was dated and entered on April 1, 1987.

The order number of the Washington state supreme court denying petition for review was filed on June 2, 1987.

Jurisdiction in this court is based upon 28 U. S. C. #1257(3).

Petitioner believes that the decision sought to be reviewed conflicts with 49, Appendix U. S. C. #1506.

STATUTES

49, Appendix U. S. C. #1506

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

STATEMENT OF THE CASE

Petitioner filed suit seeking an injunction. The complaint reads as follows:

> In the Superior Court in and for the county of King, state of Washington
>
> | | | |
> |---|---|---|
> | Gordon McLean Campbell, Plaintiff |) | No. 86-2-64846-4 |
> | v. |) | |
> | The Boeing Company, Defendant |) | Plaintiff's Complaint for Injunction |
>
> The plaintiff alleges as follows:
>
> I
> Plaintiff
> Plaintiff is a citizen of the United States and a resident of Seattle, Washington.
>
> II
> Defendant

Defendant is a corporation engaged in the building and sale of airplanes with principal offices in King County, Washington.

III

Seattle activity

Many airplanes built by defendant daily fly over Seattle. These airplanes are flown without the crews thereof being informed of a new explanation for the movement of the air which directly relates to the operation of the airplanes. Many people in Seattle are also unaware of the new explanation of the movement of the air.

IV

The new explanation for the movement of the air

The new explanation for the movement of the air is that the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will.

V

Effect of the new explanation

The possibility the air is alive presents the possibility that the air, by intelligent, controlled, voluntary movements, could cause the airplane to shift its path. Also presented is the possibility that the intelligent air could use movements of the air as signals to the crew regarding the aircraft's flight.

VI

Resulting hazard

Plaintiff's life is endangered by the fact that the crews of the airplanes, referred to in paragraph III hereof, are not notified of the new explanation for the movement of the air, since this lack of information increases the risk of falling airplanes in Seattle.

VII

Conditions precedent

All conditions precedent have been completed.

Prayer

Wherefore, plaintiff asks that defendant be ordered, in future sales of airplanes, to include an instruction to the crews of the existence and nature of the new explanation of the movement of the air.

Dated this 17th day of March, 1986.

s/Gordon McLean Campbell

Gordon McLean Campbell,
Plaintiff
1631 Belmont Avenue
#208
Seattle, WA 98122

Respondent moved to dismiss and to strike the complaint basing the motion, among other bases, upon the trial court's lack of jurisdiction of the subject matter. (defendant's motion to dismiss and to strike complaint)

In defendant's memorandum in support of motion to dismiss and to strike complaint, respondent contended that the federal aviation administration had authority over these matters and that the doctrine of primary jurisdiction deprived the court of jurisdiction of the subject matter.

In plaintiff's brief in opposition to defendant's motion to dismiss and to strike complaint, petitioner contended that the trial court did have jurisdiction over the subject matter under 49, Appendix U. S. C. #1506, the savings clause of the federal aviation program. This statute preserves existing common law and statutory remedies.

Petitioner contended that the complaint set forth a common type of suit for injunction to prevent the hazard of falling objects and that courts have usually had jurisdiction over this type

of case. Therefore, petitioner contended, the court had jurisdiction of the subject matter notwithstanding the doctrine of primary jurisdiction.

Petitioner further showed the trial court that, prior to bringing suit, he had petitioned the U. S. secretary of commerce for issuance of a rule regarding the new explanation for the movement of the air. (affidavit of Gordon McLean Campbell) The petition, he stated, was referred to the transportation department who at first denied jurisdiction. Later, he stated, the federal aviation administration declined to issue a rule.

Petitioner alleged that the new explanation was unknown to the crews of planes sold by defendant which fly over Seattle. (Plaintiff's complaint for injunction) Petitioner thereby showed that there was no statute or regulation regarding the new explanation.

The trial court passed upon the contentions of the parties by entering an order granting motion to dismiss and strike complaint. The order did not include reasons for the decision.

Petitioner filed appeal directly to the Washington state supreme court. The brief of appellant, brief of respondent and reply brief of appellant were filed.

After the briefs were filed, the Washington supreme court transferred the case (including the record) to the Washington court of appeals, division one for determination.

The court of appeals set the case for hearing and petitioner moved to advance the case to an earlier hearing date.

The court of appeals then set a court's motion on the merits to be heard on February 20, 1987.

In petitioner's response to court's

motion on the merits, petitioner noted that, under the allegations of plaintiff's complaint for injunction, it is possible for plaintiff to show that the new explanation for the movement of the air, upon which the complaint is based, is supported by plaintiff's personal experience of hearing the voice of God speak to plaintiff from out of the adjacent air, this experience indicating that the air possibly is God or part of God and blowing and moving by means of inherent life and will.

In the response, petitioner cited United States v. Ballard, 322 U. S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944), in which case it was held that the contention that Jesus Christ came down to earth and spoke to twentieth century humans was a valid religious belief and experience.

The court's motion on the merits

was heard on the trial court record, the briefs filed in the supreme court, appellant's response to court's motion on the merits and oral argument by appellant and counsel for respondent.

The questions regarding the jurisdiction of the trial court over the subject matter and the application of the doctrine of primary jurisdiction were raised in the court of appeals in the same manner they were raised in the trial court (pp.2-6, supra) since the trial court record was before the court of appeals.

The questions were also raised by the briefs of the parties.

In the brief of appellant, pp. 15, 16, petitioner contended that 49, Appendix U. S. C. #1506, as construed in Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), granted the trial court jurisdiction of

the subject matter.

Petitioner contended that since the suit was one for injunction to prevent the hazard of falling objects (a familiar type of suit) and since there was no federal statute or regulation regarding the new explanation for the movement of the air, under the holding of Nader, petitioner's right of suit was preserved by #1506 and the trial court did have jurisdiction.

For the same reasons, petitioner contended that #1506, as construed in Nader v. Allegheny Airlines, Inc., supra, made inapplicable the doctrine of primary jurisdiction. (brief of appellant, pp. 16-18)

The court of appeals passed upon these questions by the commissioner's ruling granting motion on the merits entered March 4, 1987.

In this ruling, the court held that

the trial court lacked jurisdiction of the subject matter and that it had properly applied the doctrine of primary jurisdiction. (As noted earlier, the trial court did not give reasons in its order)

Petitioner filed a motion to modify ruling. Respondent filed a response to this motion.

On April 1, 1987, the court of appeals entered an order denying motion to modify.

On April 22, 1987, petitioner filed a petition for review with the Washington supreme court. Respondent filed an answer to petition for review.

The petition was denied on June 2, 1987.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the court below conflicts with Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48

L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506.

In Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), 49, Appendix U. S. C. #1506 was construed. #1506 is the savings clause of the federal aviation program (formerly federal aviation act). #1506 reads as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In Nader, suit was brought for fraudulent misrepresentation based on the airline's alleged failure to inform plaintiff in advance of its deliberate overbooking practices. In holding that plaintiff's right of suit was preserved by #1506, the court said:

"The court in the present case, in

> contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate--or, indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so.....Under the circumstances, the common-law action and the statute are not 'absolutely inconsistent' and may coexist, as contemplated by #1106 (#1506)". 426 U. S. at 299

Thus, it was held that, since there was no regulation regarding the over-booking practices, the common law suit was not inconsistent with the federal aviation act.

In the present case, a closely analogous situation is involved. Here, petitioner brought suit for an injunction requiring respondent to notify the crews of planes to be sold by it of a new explanation for the movement of the air.

There is no statute or regulation regarding the new explanation. Thus,

under the holding of Nader, petitioner's suit for injunction may coexist with the federal aviation program.

The court below, in the commissioner's ruling granting motion on the merits, said: "Here, there would be a conflict if a state court were to order Boeing to give the instructions Campbell wishes, when the federal aviation agency (FAA) has declined to issue such a rule."

Petitioner contends that this holding conflicts with that of Nader, supra. Nader in fact held that, where there was no regulation regarding the subject of the suit, there was no conflict with the federal aviation act and the common law suit was preserved.

Here, the decision of the federal aviation administration not to issue a rule regarding the new explanation for the movement of the air merely left unchanged the fact that there is no

statute or regulation regarding the new explanation. As shown earlier, where there is no such statute or regulation, the right of suit is preserved under #1506.

In Columbia Broadcasting System v. U. S., 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942), the court said:

> "Of course, the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them." 316 U. S. at 421

Thus, an agency has discretion whether or not to issue a rule. An agency may decline to issue a rule and afterwards apply the principle sought to be set forth in the rule on a later

case to case basis.

Thus, the decision of an agency not to issue a rule is not determinative of the validity of the principle sought to be set forth in the rule and, here, the decision of the federal aviation administration not to issue a rule regarding the new explanation for the movement of the air is not controlling with respect to the validity of said explanation.

Therefore, contrary to the holding of the court below, the decision of the federal aviation administration not to issue a rule presents no conflict with the instructions sought by petitioner's complaint for injunction.

Further, as shown earlier, prior to bringing suit, petitioner petitioned the U. S. secretary of commerce for a rule respecting the new explanation. This was done because the commerce department

includes the national weather service, 15 U. S. C. #311-329.

The petition was referred to the transportation department. Afterwards, the federal aviation administration, a part of the transportation department, declined to issue the rule.

In C. A. B. v. Delta Airlines, Inc., 367 U. S. 316, 6 L. Ed.2d 869, 81 S. Ct. 1611 (1961), where an agency failed to follow statutory procedure in entering an order, the order was invalid.

In the present case, the petition for a rule was not filed with nor pursuant to the procedure of the federal aviation administration. Hence, the refusal to issue a rule may be subject to question.

For these reasons, under 49, Appendix U. S. C. #1506, the trial court did have jurisdiction over the subject matter.

In this case, the complaint prays

that respondent be required to instruct the crews of planes to be sold by respondent that fly over Seattle regarding the possibility that the air, by intelligent, controlled, voluntary movement, could shift the path of a plane.

In Fleming v. Delta Airlines, 359 F. Supp. 339 (S. D. N. Y. 1973), a passenger sustained injuries when the wind (turbulence) bounced an airliner about. He sued, contending the airlines should have notified him of the storm of which the airlines had advance notice.

The court allowed recovery saying:

> "However, it (the airline) owes its passengers the duty to share with them information indicating such serious weather disturbances, so that they can choose for themselves whether they are physically and emotionally capable of undertaking the trip and wish to do so." 359 F. Supp. at 341

Since the complaint here involves similar facts (the possibility the air voluntarily could shift a plane about),

the trial court had jurisdiction over the subject matter.

The doctrine of separation of church and state does not deprive the court of jurisdiction.

15 U. S. C. #313 provides:

> "The Secretary of Commerce shall have charge of..... the distribution of meteorological information in the interests of agriculture and commerce, and the taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States, or as are essential for the proper execution of the foregoing duties."

This statute authorizes inquiries into the cause of the air's movement and, thusly, a new explanation for the movement of the air. Aristotle's theories of the movement of the air, long followed, were rejected in the 19th century. (See Encyclopedia Americana, Meteorology, 1987)

As a result, if the inquiry into the cause of the air's movement reveals the possibility the air is alive, an intelligent

form of life, God or part of God, and blowing and moving by means of inherent life and will, this possibility is a statutory exception to the doctrine of separation of church and state.

Hence, the trial court had jurisdiction over the subject matter of the complaint.

The ruling of the court below, Appendix p. a5 , states: "In deciding it had no subject matter jurisdiction, the trial court applied the doctrine of primary jurisdiction..... Here, the court applied the doctrine and deferred to the expertise of the FAA."

In fact, as mentioned earlier, the order of the trial court did not say this since the order did not include reasons for the decision.

In Nader v. Allegheny Airlines, Inc., 426 U. S. 290, supra, the application of the doctrine of primary jurisdiction was considered.

At 426 U. S. 304, the court said:

> "Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. (footnote omitted) Petitioner also makes no challenge, comparable to those made in (citations omitted), to limitations on common-law damages imposed through exculpatory clauses included in a tariff..... The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case."

Here, petitioner contends that, under the holding of Nader, primary jurisdiction is not applicable to the complaint.

The present suit is for an injunction to prevent the hazard of falling objects. This is a familiar case. See Harris Stanley Coal & Land Co. v. Chesapeake &

O. Ry. Co., 154 F.2d 450 (1946) where an injunction was granted to avoid the possibility of falling material from defendant's mine down upon plaintiff's tracks.

Petitioner contends that the instant case involves questions that are proper for a court to decide and that there is nothing that should be referred to an administrative body.

Since this case arises on a motion to dismiss, the facts are the allegations of the complaint. In the trial court, petitioner also showed that he had, prior to suit, petitioned for issuance of a rule regarding the new explanation for the movement of the air.

In addition, in the court below, petitioner showed that, under the allegations of plaintiff's complaint for injunction, it is possible for plaintiff to show that the new explanation for the

movement of the air, upon which the complaint is based, is supported by plaintiff's personal experience of hearing the voice of God speak to plaintiff from out of the adjacent air, this experience indicating that the air possibly is God or part of God and blowing and moving by means of inherent life and will.

Petitioner cited United States v. Ballard, 322 U. S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944) in which it was held that the claim that Jesus Christ appeared on earth and talked to twentieth century persons was a valid religious belief and experience.

The complaint alleges (undenied on the motion to dismiss) that many planes built by respondent daily fly over Seattle without the crews being informed of the new explanation.

The complaint further alleges that the new explanation involves the

possibility that the air could, by intelligent, controlled movements, shift the path of a plane. A reasonable inference from this allegation is that the air could, by controlled, voluntary movements, force a plane down to an exact place on the earth.

The complaint also alleges that petitioner lives in Seattle and prays that respondent be required to notify the crews of planes to be sold by respondent in the future of the new explanation.

Petitioner maintains that these undenied factual allegations set forth issues for the court, not an administrative agency, to decide. Nader v. Allegheny Airlines, Inc., supra.

In Fleming v. Delta Airlines, 359 F. Supp. 339, the court, not an agency, considered the question whether damages could be recovered for injuries

received when the wind shifted and jostled an airliner.

Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450, explains the standards to be applied when an injunction is sought to prohibit the danger of falling objects.

These are the standards to be applied in the present case seeking to enjoin the hazard of falling planes in Seattle where petitioner lives.

Nader, supra, held that, where the standards to be applied are within the conventional competence of the courts, primary jurisdiction is not pertinent.

Since the standards to be applied here are those set forth in Harris Stanley Coal & Land Co., supra, under the holding of Nader, primary jurisdiction is not relevant.

The fact that a new explanation for the movement of the air is involved does

not alter the situation.

The only question presented about the new explanation is whether the crews should be instructed of it. The nature and existence of the new explanation are not denied by the motion to dismiss.

In fact, the new explanation is not subject to denial. It is a physical possibility of the atmosphere that the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will. (See Encyclopedia Americana, Meteorology, 1987 with reference to the possibility of a new explanation for the movement of the air.)

Petitioner maintains that the question whether the crews should be informed of the new explanation is a question for the court rather than an administrative body.

In Harris Stanley Coal & Land Co. v.

Chesapeake & O. Ry. Co., 154 F.2d 450, at 453, the court said:

> "The primary test of equitable jurisdiction to grant a permanent injunction is whether there does or does not exist an adequate legal remedy for the injury sought to be prevented."

> "The pictorial exhibits graphically depict the steep face of the cliff behind which the pillars stand, and its proximity to the railroad tracks, and it is indeed bold prophecy which denies the threatened danger. A court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate."

These tests are the ones to used here in deciding whether an injunction should be granted requiring respondent to notify the crews of the new explanation.

The precise issue here is whether the possibility the air could, by controlled, voluntary movements, blow or force a plane down to an exact spot in Seattle is such a serious possibility that the crews

should be notified of the possibility. (Informed of it, the crews possess the possibility of taking adaptive action.)

Applying the tests of Harris Stanley Coal & Land Co., supra, the question is whether the planes sold by respondent flying over Seattle with the crews unaware of the undeniable possibility that the air could, by voluntary, controlled movements, blow or force a plane down to an exact place in Seattle constitute such a threat to petitioner's life as to render the remedy at law inadequate and justify the grant of an injunction.

Therefore, since the decision of the case involves the application of the tests set forth in Harris Stanley Coal & Land Co., supra, it is clear that the questions are within the conventional competence of the courts.

Also, here there are no statutes or

regulations respecting the new explanation.

Under the holding of Nader v. Allegheny Airlines, Inc., supra, when the standards to be applied to a case are within the conventional competence of the courts and there is no regulation about the subject of the suit, primary jurisdiction is inapplicable. Thusly, it is not pertinent in the present case.

Therefore, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506, the trial court had jurisdiction of the subject matter of the complaint and primary jurisdiction was not applicable.

A decision of the U. S. supreme court construing a federal statute is the supreme law of the land. U. S. v. Gilbert Associates, Inc., 345 U. S. 361, 97 L. Ed. 1071, 73 S. Ct. 701 (1953).

Thus, the decision of the court below conflicts with Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506.

CONCLUSION

Because of the foregoing reasons and authorities, the ruling of the commissioner of the court of appeals of the state of Washington division one should be reversed and the case remanded to said court for further proceedings.

Gordon McLean Campbell

Petitioner

APPENDIX

In the court of appeals of the state of Washington division one

Gordon McLean Campbell, Appellant, v. The boeing company, Respondent.	)	No. 19318-0-I
	)	Commissioner's ruling granting motion on the merits

Gordon McLean Campbell appeals from dismissal of his claims against the boeing co. (boeing). The court has set a motion on the merits pursuant to RAP 18.14(a). The commissioner has considered the files and record, heard oral argument and has determined that the motion should be granted.

Facts

In March 1986 Campbell filed a complaint for injunction, seeking to require boeing to inform the crews of all airplanes which it sells that there is a new explanation for the movement of

al

the air, i.e. that "the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will." Campbell also alleged that his life was endangered by boeing's failure to so instruct, as the lack of information "increases the risk of falling airplanes in Seattle." Boeing moved pursuant to CR 12(b)(1) and 12(b)(6) for dismissal. The trial court dismissed the complaint with prejudice. Campbell appeals and presents two issues.

Issue

1. Does the trial court have subject matter jurisdiction over this complaint?

2. Did Campbell's complaint set forth a claim on which relief could be granted?

Criteria for determining whether to grant a motion on the merits

RAP 18.14(e) provides:

> A motion on the merits will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the.....commissioner will consider all relevant factors including whether the issues on review (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria, the commissioner determines that the issue presented is clearly without merit.

Decision

Campbell first argues that the trial court erred in concluding that it lacked subject matter jurisdiction to hear the complaint. He cites 49 U. S. C. #1506, which provides: "Nothing contained in this chapter shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such

remedies."

The United States supreme court has interpreted 49 U. S. C. #1506 to mean that where there is an irreconcilable conflict between the statutory scheme and the presence of common law remedies, the state court common law action must yield. Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978, 1984 (1976); see Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907). Here, there would be a conflict if a state court were to order Boeing to give the instructions Campbell wishes, when the Federal Aviation Agency (FAA) has declined to issue such a rule. The state court would then be in the position of injecting itself into the technical field of airline procedures, which are extensively regulated by the federal government. Thus, Campbell's common law

remedies must yield to the FAA regulations.

In deciding it had no subject matter jurisdiction, the trial court applied the doctrine of primary jurisdiction. Under that doctrine, which is concerned with promoting proper relationships between the courts and administrative agencies, Nader at 1986, the court may defer to the expertise of an agency which has a special competence over an issue. Nader at 1987; S. S. Kresge Co. v. Port of Longview, 18 Wn. App. 805, 809, 573 P.2d 1336 (1977). The application of the doctrine is within the sound discretion of the trial court, Kresge at 809; Kerr v. Department of Game, 14 Wn. App. 427, 542 P.2d 467 (1975). Here, the court applied the doctrine and deferred to the expertise of the FAA. Campbell has failed to establish this act was an abuse of discretion and this contention is without merit.

Campbell also argues that contrary

to the trial court's conclusion his complaint stated a claim on which relief could be granted. In a motion brought under CR 12(b)(6), factual allegations of the complaint must be accepted as true. Berge v. Gorton, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Even if the facts as stated in Campbell's complaint were true, the trial court was correct in dismissing the complaint once it determined that it lacked jurisdiction. A trial court may be affirmed on any theory within the pleadings and proof. Wilkinson v. Smith, 31 Wn. App. 1, 639 P.2d 768 (1982). The trial court acted properly in dismissing the complaint. Now, therefore, it is hereby

ORDERED that the motion is granted and the trial court is affirmed.

Done this 4th day of March, 1987.

Jo Anne L. Tompkins

court commissioner

In the superior court of the state of Washington in and for the county of king

Gordon McLean Campbell, Plaintiff, vs. The boeing company, Defendant.	Civil no. 86-2-04846-4 Order granting motion to dismiss and strike complaint

Defendant the boeing company, having moved this court pursuant to rules 11 and 12(b) and (f) for an order striking the complaint and dismissing this action with prejudice, and the matter having come on for hearing based on the complaint and the briefs and arguments of the parties and counsel for the parties, and the court being fully advised in the premises, it is now hereby

Ordered, adjudged, and decreed that the complaint in the instant matter be and the same is hereby stricken; it is

Further ordered that the instant action be and the same is hereby dismissed with prejudice and at plaintiff's costs.

Dated this 22nd day of April, 1986.

Patricia Aitken

Superior court judge

Entered April 22, 1986

The supreme court of the state of Washington

Gordon McLean Campbell)
v.)
The Boeing Company)
)

No. 53869-7
Order number 161/176

Petition for review denied.

Entered June 2, 1987

The judgment or decree sought to be reviewed is the commissioner's ruling granting motion on the merits, pp. a1-a6 supra. Entered March 4, 1987

In the court of appeals of the state of Washington division I

Gordon McLean Campbell) Appellant,) v.) THE BOEING COMPANY,) Respondent.)	No. 19318-0-I ORDER DENYING MOTION TO MODIFY

Gordon McLean Campbell has filed a motion to modify the commissioner's ruling granting a motion on the merits and affirming the decision of the trial court. Respondent has filed a response to the motion to modify entitled "The Boeing Company's Opposition to Motion to Modify Ruling." A panel of this court has considered the matter pursuant to RAP 17.7 and In re Marriage of Wolfe, 99 Wn. 2d 531, 663 P.2d 469 (1983), and has determined that the motion should be denied for the reasons set forth in the commissioner's ruling. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 1st day of April, 1987.

Scholfield, CJ

Grosse, J. Webster, J

Entered April 1, 1987